Supreme Court, U. S.
FILED
JAN 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74 859

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, [redacted],

Appellants,

v.

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT CONVENED IN THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

PHILIP H. BUSNER
Attorney for Appellants
Curtis Circulation Company
Continental Casualty Company
110 East 59th Street
New York, New York 10022

FRED I. SONNENFELD
YOUNG, SONNENFELD & BUSNER
Of Counsel

TABLE OF CONTENTS

	PAGE
Jurisdictional Statement	1
The Opinions Below	2
Statement of the Grounds on Which the Jurisdiction of this Court is Invoked	2
The Statute Involved	2
Questions Presented by the Appeal	3
Statement of Facts of the Case	3
The Questions Presented are Substantial and Require Plenary Consideration	7
1. There is a Substantial Question Whether a Preliminary Hearing Which Tests the *Prima Facie* Showing of Plaintiff and Shifts the Burden of Rebuttal to Defendant Satisfies Due Process	8
2. There is a Substantial Question Whether any Prejudgment Seizure of Property in which the Plaintiff does not have a Vendor's Lien or a Similar Statutory Lien can Meet the Test of Due Process Regardless how Protective the Scope and Nature of the Preliminary Hearing are to a Defendant	13
3. There is a Substantial Question Whether any Prejudgment Seizure Grounded on Fraud can Meet the Test of Due Process, Regardless how Protective the Scope and Nature of the Preliminary Hearing are to a Defendant	14

PAGE

4. There is a Substantial Question Whether Prejudgment Seizures Grounded upon Dissipation, Secretion, or Removal from the Reach of the Plaintiff of Assets Required to Satisfy a Judgment, Meet the Due Process Test 15

Conclusion 16

Table of Cases

Abdun-Nur v. *Arbeed,* 198 App. Div. 795, 191 N.Y.S. 38 (1921) 10

Anderson v. *Malley,* 191 App. Div. 573, 181 N.Y.S. 729 (1920) 10

Banco Agricola v. *Jiminez Export (N.O.R.),* 97 N.Y.S.2d 437 (1950) 10

Coffin Brothers & Co. v. *Bennett,* 277 U.S. 29 (1928) .. 7

Durkin v. *Paten,* 97 App.Div. 139, 89 N.Y.S. 622 (1904) 10

Ecco High Frequency Corp. v. *Amtorg Trading Corp. (N.O.R.),* 81 N.Y.S.2d 610 (1948), aff'd 274 App.Div. 982, 85 N.Y.S.2d 304 10

Favta Societe Anonyme v. *United Kingdom Machinery Corp.,* 10 Misc.2d 326, 167 N.Y.S.2d 287 (1957) 10

Fuentes v. *Shevin,* 407 U.S. 67 (1972) 8, 9, 15

Gitlin v. *Stone,* 262 F.Supp. 500 (1967) 11

Hill v. *Atanasio (N.O.R.),* 127 N.Y.S. 344 (1911) 10

J. H. Mohlman Co. v. *Landwehr,* 87 App. Div. 83, 83 N.Y.S. 1073 (1903) 10

Makepiece v. *Dilltown Smokeless Coal Co.,* 179 App. Div. 662, 167 N.Y.S. 83 (1917) 10, 11

PAGE

McKay v. *McInnes*, 279 U.S. 820 (1929) 7

Mitchell v. *W. T. Grant Co.*, 416 U.S. 600 (1974) ..8, 9, 13, 14

Ownbey v. *Morgan*, 256 U.S. 94 (1921) 7

Sniadach v. *Family Finance Corp.*, 395 U.S. 337 (1969) 7

STATUTES

New York Civil Practice Law and Rules 6201 (4) (5) and (8) 2, 5, 6, 15

New York Civil Practice Law and Rules 6211 ..... 2, 7

New York Civil Practice Law and Rules 6212 .....5, 10, 12

New York Civil Practice Law and Rules 6223 11

New York Debtor and Creditor Law § 273 *et seq.* ... 14

28 U.S.C. § 1253 2

42 U.S.C. § 1983 2

MISCELLANEOUS

McKinney's Consolidated Laws of New York, Book 7B (10th Volume), pp. 31 through 123 2

McKinney's Consolidated Laws of New York, Supplementary Practice Commentary, CPLR 6223, Cumulative Pocket Part p. 47, main volume p. 106 11

New York Law Journal, October 31, 1974, p. 1, col. 6 9

New York Law Journal, November 19, 1974, p. 4, col. 8 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT and GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

v.

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM A THREE-JUDGE DISTRICT COURT CONVENED IN THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants Curtis and Continental appeal from a final judgment of the United States District Court for the Southern District of New York entered on November 6, 1974, which *inter alia* declared unconstitutional portions of the New York Attachment Statute. The Attorney General of the State of New York is filing a separate Jurisdictional Statement on behalf of all other appellants. Appendix references made herein refer to the Appendix to the Jurisdictional Statement of the Attorney General.

The Opinions Below

The opinion convening the three-judge court is reported at 377 F.Supp. 1055 and appears as Appendix B (15a). The opinion of the three-judge court is not yet reported. It appears as Appendix A (1a).

Statement of the Grounds on Which the Jurisdiction of this Court is Invoked

(i) This action was brought by Appellees pursuant to the Civil Rights Act, 42 U.S.C. 1983, challenging the constitutionality of portions of the New York Attachment Statute, New York Civil Practice Law and Rules, Section 6201, Subparagraphs (4), (5) and (8) and Section 6211 and seeking injunctive and declaratory relief.

(ii) The judgment sought to be reviewed is dated November 1, 1974 and was entered on November 6, 1974. It appears as Appendix C (31a). No petition to rehear was filed. The Notices of Appeal were filed on November 27 and 29, 1974 in the United States District Court, Southern District of New York and appear as Appendices D and E (33a, 35a).

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. 1253.

The Statute Involved

The validity of New York Civil Practice Law and Rules, Article 62, Section 6201, Subparagraphs (4), (5) and (8) and Section 6211 is here involved. The text of Article 62 appears as Appendix F (37a). The official edition where said statute may be found is *McKinney's Consolidated Laws of New York,* Book 7B (10th Volume), page 31 through page 123.

Questions Presented by the Appeal

The following questions are presented by this appeal:

1. Does a state statute meet the test of due process when it (a) conditions the issuance of an *ex parte* attachment upon (i) a factual *prima facie* showing of the grounds therefor to a judge and (ii) the posting of a bond to indemnify the defendant against legal costs and damages, and (b) provides the defendant the immediate right to vacate such attachment either (i) by posting a bond or (ii) by an adversary hearing in which plaintiff's *prima facie* showing is tested and the burden of rebutting such *prima facie* showing shifts to the defendant?

2. Does such a statute meet the test of due process to the extent it permits attachment of property in which the plaintiff does not have a vendor's lien or a similar statutory lien?

3. Does such a statute meet the test of due process to the extent that the grounds for attachment are based upon fraud?

4. Does such a statute meet the test of due process to the extent that the ground for attachment is based upon dissipation, secretion or removal from the reach of the plaintiff of assets required to satisfy a judgment?

Statement of Facts of the Case

In August 1971, Appellant Curtis Circulation Company (hereinafter "Curtis") entered into a written distribution agreement with Appellee Bert Randolph Sugar (hereinafter "Sugar") and a corporation which he then designated "Champion Sports, Inc.", but which in fact it later turned out was a non-existing corporation. Sugar used a number of corporate name variations containing "Champion" but

it later turned out there was only one corporation bearing that name, to wit, Champion Sports Publishing Inc. (hereinafter "Champion"). Sugar and Champion were publishers of a number of periodicals and Curtis was, and is, engaged in the business of distributing periodicals throughout the United States and abroad. Curtis undertook to distribute a number of designated periodical titles for Champion. By the terms of the agreement Curtis advanced substantial sums of money to Champion and the agreement provided that Curtis could recoup such advances from sales of subsequent issues of the periodicals which it agreed to distribute for Champion. The agreement was for a term of five years.

Sometime prior to April 13, 1973, at a time when Curtis was owed substantial moneys advanced to Champion and the contract still had more than three years to run, it came to the attention of Curtis that without notice to it, all of the periodicals which were the subject of the distribution agreement had purportedly been sold to third parties. The purported seller was a corporation known as Wrestling Revue, Inc. (hereinafter "Wrestling"). One of the purported vendees was a Canadian corporation.

Upon further investigation, Curtis ascertained that no consideration had been paid to Champion for such purported sales but that the consideration therefor had been paid or was payable to Wrestling. Curtis also determined that the controlling stockholder of Wrestling as well as Champion was Sugar and that representations had been made to the vendees of the periodicals which were the subject of the distribution agreement that Champion had never really been the owner of such periodicals but that it had a mere license to publish the same which had been issued by Wrestling, the claimed owner.

Neither the alleged license nor the alleged ownership by Wrestling had ever been disclosed to Curtis, if such representations were indeed true, and Sugar had repre-

sented to Curtis that he through Champion was the owner of such periodicals. It became apparent to Curtis that Sugar had either engaged in fraud at the inception of the distribution agreement and/or had entered into a fraudulent scheme thereafter, using Wrestling and Champion, two corporations controlled by him, and purported licenses running from Wrestling to Champion, for the illegal purpose of effectually avoiding the distribution agreement, depriving Champion of all of its assets, and depriving Curtis of the security to which it was entitled under the distribution agreement, *viz,* the ability to recoup advances from future issues of periodicals owned by Champion and distributed by Curtis.

When Sugar and Champion, through their attorneys, were confronted with the facts uncovered in the Curtis investigation, they would give no satisfactory explanation or make any arrangements to pay, or secure payment, to Curtis of the moneys already advanced. As the periodicals had already been removed from Champion and consideration therefor, to the extent it already had not been paid, would flow to Sugar through Wrestling, Curtis had to act promptly to arrest the continued flow and dissipation of assets belonging to Champion to which Curtis was entitled to look as a matter of law and particularly under its distribution agreement with Champion and Sugar.

Sometime prior to April 13, 1973 Curtis applied to a Justice of the New York Supreme Court, New York County, for an order of attachment pursuant to CPLR § 6201, Subparagraphs (4), (5) and (8). Pursuant to the statute, CPLR 6212, Curtis submitted an evidentiary showing by affidavit and documents of the grounds for the attachment, particularly showing the facts described herein and also submitted the required statutory bond. The application was made *ex parte.* One of the attorneys for Curtis appeared before Appellant Justice Sidney A. Fine who reviewed the papers and interrogated said attorney

and thereafter issued an order of attachment on April 13, 1973. The application was made on three alternative grounds all involving elements of fraud and deceit. One ground was based on CPLR 6201, Subparagraph (4):

> "the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts."

The second ground was based on Subparagraph (5):

> "the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability."

The third ground was based on Subparagraph (8):

> "there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit."

The application of Curtis was also accompanied by a verified complaint stating, *inter alia,* a cause of action for fraud and deceit, the evidentiary facts of which were presented in the affidavit submitted upon the application for the attachment as required by New York law.

On April 16, 1973, the Sheriff of the City of New York made a levy upon the moneys held by National Sports Publishing Corporation, which were the purported consideration for purported sales to it by Wrestling of periodicals which were the subject of the distribution agreement between Curtis and Champion.

On January 3, 1974, Appellees herein commenced this action in the United States District Court, Southern District of New York, to enjoin the enforcement of the statute under which such attachment was issued and for a declaration of the unconstitutionality of such statute. At the time that this action was commenced, the state action in

which the attachment had issued had been pending since April 13, 1973. The summons and complaint were served on April 18, 1973 and issue was joined on April 27, 1973. Pretrial discovery proceedings were in progress. Appellees never challenged the attachment in the state court.

On October 17, 1974, the three judge court convened to hear and determine Appellees' constitutional challenge rendered its opinion in which it declared to be unconstitutional New York Civil Practice Act and Rules §§ 6201 Subparagraphs (4), (5) and (8) and 6211.

Judgment granting a permanent injunction against enforcement of the statute and declaring the same to be unconstitutional was rendered by the court under date of November 1, 1974 and such judgment was entered with the clerk of said District Court on November 6, 1974. The judgment included a stay of the operation of the judgment until determination by, or order of, this court.

The Questions Presented are Substantial and Require Plenary Consideration

While this Court has on several occasions reviewed generally whether statutes providing for prejudgment seizures of property afford due process, this appeal squarely presents a number of substantial issues which have not previously been reviewed or determined by this Court.

In *Ownbey* v. *Morgan*, 256 U.S. 94 (1921), *Coffin Brothers & Co.* v. *Bennett*, 277 U.S. 29 (1928) and *McKay* v. *McInnes*, 279 U.S. 820 (1929), this Court upheld the constitutionality of *ex parte* attachments where the application for the same was not supported by any affidavit or the posting of a bond and where the defendant's right to a hearing was postponed to the plenary trial of the action.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), this Court, while recognizing that due process does

not generally require prior notice and hearing for prejudgment seizure of property, held that prior notice and hearing might be required in specific instances and found that the wage garnishment under review was such a specific case. In *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), this Court indicated that prior notice and hearing might generally be required altho it recognized a number of instances in which it was not required. In *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974), this Court reaffirmed that prior notice and hearing was not required, at least if the procedural safeguards attending an *ex parte* order and following its issuance reached a constitutional accommodation of the conflicting interests of the parties.

While the Court below found substantial parallels between the Louisiana statute reviewed in *Mitchell* and the New York statute, it relied upon three grounds which it found to distinguish the case under review from *Mitchell.* First, it interpreted the New York law as placing the burden of proof on the defendant at the preliminary hearing. Second, it found that due process was not satisfied absent a statutory requirement that the plaintiff have a possessory lien. Third, it found that prejudgment attachments grounded on fraud violate due process as fraud issues are not amenable to easy proof on a preliminary hearing. The lower court's reliance on each of these distinctions raises substantial issues on this appeal.

1. There is a Substantial Question Whether a Preliminary Hearing Which Tests the *Prima Facie* Showing of Plaintiff and Shifts the Burden of Rebuttal to Defendant Satisfies Due Process.

While some had read *Fuentes* as a departure from the prior holdings of this Court that *ex parte* prejudgment seizures were consistent with due process, *Mitchell* clearly reaffirmed such prior holdings.

The Complaint in this action attacked the constitutionality of the New York attachment statute solely on the

ground that the order of attachment issued *ex parte*, relying upon Appellees' interpretation of the holding in *Fuentes*. The decision in *Mitchell* was rendered after the action was commenced. Consequently, the Appellees shifted their attack upon the New York statute, urging upon the lower court the proposition that the preliminary hearing in New York is distinguishable from the hearing afforded under the Louisiana statute reviewed in *Mitchell* in that it places the burden of proof upon the defendant and consequently it does not meet the test of due process. Although the argument misapprehends the New York statute and case authorities (see *infra*), it was accepted by the lower court.

Thus, while the lower court found unconstitutional only such portions of the New York statute as provided for *ex parte* attachments grounded on fraud, the *rationale* of the main ground of the decision below, that the preliminary hearing is deficient, would seem to render unconstitutional all New York attachments, whatever the grounds and regardless whether hearing is had before or after the order issues.[1]

---

[1] As the writ issued in this case was in fact *ex parte*, the decision of the court below did not require consideration of writs issued under the same sections (grounded on fraud) after notice and hearing. However, the wider implications of the decision have already caused some strange and conflicting consequences in the New York State Courts. For instance, it was announced in the New York Law Journal of October 31, 1974, p. 1, col. 6, that the New York Civil Court (a state court of limited jurisdiction in the City of New York) would continue to issue *ex parte* attachments provided that the *ex parte* order contained provision that within three days after levy by a sheriff, the plaintiff would move on notice to the defendant to justify the grounds of the attachment and upon such motion, the plaintiff would have the burden of proof. This procedure is applicable to attachment sought on all grounds under Article 62 including, e.g., jurisdictional grounds. By contrast, the State Supreme Court, New York County (also a court of first impression but without limited jurisdiction) has discontinued the issuance of *ex parte* attachments in cases grounded on fraud. See, New York Law Journal, November 19, 1974, page 4, col. 8. Hence, the Civil

(footnote continued on following page)

Hence, one of the issues squarely presented on this appeal is whether a preliminary hearing which tests the *prima facie* showing of the plaintiff and shifts the burden of rebuttal of such *prima facie* showing to defendant satisfies due process.

The issue is so stated by reason of the fact that CPLR 6212 imposes upon the plaintiff the initial burden of proving by evidentiary facts and documents that he is entitled to the order of attachment. The New York courts have held that upon an application for an order of attachment the plaintiff has the burden of proving by evidentiary facts and documents a *prima facie* case sustaining his cause of action and the grounds for attachment. *Durkin* v. *Paten,* 97 App. Div. 139, 89 N.Y.S. 622 (1904); *J. H. Mohlman Co.* v. *Landwehr,* 87 App. Div. 83, 83 N.Y.S. 1073 (1903); *Hill* v. *Atanasio* (N.O.R.), 127 N.Y.S. 344 (1911); *Ecco High Frequency Corp.* v. *Amtorg Trading Corp.* (N.O.R.), 81 N.Y.S.2d 610 (1948), aff'd 274 App. Div. 982, 85 N.Y.S.2d 304; *Banco Agricola* v. *Jiminez Export* (N.O.R.), 97 N.Y.S.2d 437 (1950); *Favta Societe Anonyme* v. *United Kingdom Machinery Corp.,* 10 Misc.2d 326, 167 N.Y.S.2d 287 (1957); see: *Anderson* v. *Malley,* 191 App.Div. 573, 181 N.Y.S. 729 (1920); *Abdun-Nur* v. *Arbeed,* 198 App.Div. 795, 191 N.Y.S. 38 (1921); *Makepiece* v. *Dilltown Smoke-*

(footnote continued from preceding page)
Court appears to be satisfied that under the decision of the court below *ex parte* orders per se are not obnoxious but that said court's finding that the defendant has the burden of proof is obnoxious. Of course, the Civil Court's new procedures do not take into account the other grounds of the decision of the court below, viz., the absence of a vendor's lien and the unsuitability of proof of fraud at a preliminary hearing. The new procedure of the Supreme Court, New York County, not only fails to take these latter items into account, but makes no provision whatsoever with respect to the nature of the hearing to which the defendant will be entitled where orders of attachment grounded on fraud are issued after notice. It appears that the lower court's decision has created more issues than it has resolved.

less Coal Co., 179 App.Div. 622, 167 N.Y.S. 83 (1917); *Gitlin* v. *Stone*, 262 F.Supp. 500 (1967).

The New York decisions relied upon by the court below for its finding that the burden of proof is on defendant in the preliminary hearing on a motion to vacate the attachment are not inconsisent.[2] As all of the cited decisions, both those cited herein and those cited in the opinion of the court below, were decided on defendant's motion to vacate an *ex parte* attachment issued on proofs already submitted by plaintiff, the New York decisions relied upon by the court below stand only for the proposition that the plaintiff having carried the burden of demonstrating the

---

[2] The lower court's conclusion that the burden of proof in New York is on the defendant is founded upon subsidiary conclusions which are demonstrably in error. Thus the lower court found that the sole ground for vacating an attachment in New York is "that the attachment is unnecessary to the security of the plaintiff." This is clearly erroneous as the statutory language itself (CPLR § 6223) demonstrates the quoted ground to be an *additional* and *alternative* ground, not an exclusive one. The entire sentence in which the language occurs makes it plain that this additional ground is designed primarily for a defendant who submits himself to the personal jurisdiction of the court after an action has been started by attachment primarily to obtain *in rem* jurisdiction. While the lower court's decision states that the quoted language has been interpreted by the New York courts for some fifty years, the fact of the matter is that the language was only added to the section some twelve years ago when the then New York Civil Practice Act was repealed and replaced by the present New York Civil Practice Law and Rules. See, *Supplementary Practice Commentary, McKinneys,* CPLR 6223, Cumulative Pocket Part p. 47 and p. 106 of the main volume citing the *Legislative Studies and Reports* covering the addition of this provision. All of the New York decisions cited by the lower court were decided before the language ever appeared in the statute except those cases cited which deal specifically with a motion to vacate *only* on the ground "that the attachment is unnecessary to the security of the plaintiff". Finally, the statement in the New York decisions cited by the lower court that the defendant has the burden of proof must be taken in the context that the statute imposes upon the plaintiff in the first instance the burden of proving a *prima facie* case entitling him to attachment. See main text.

grounds for attachment in the first instance, on the motion to vacate, the burden shifts to the defendant.[3]

The fact that the burden of proof in New York is on the plaintiff is easily demonstrable if we view the statutory procedure as applied to an application for attachment made by a plaintiff on prior notice and hearing, a procedure for which the statute provides as well as an *ex parte* application. If the application is made on notice, clearly Rule 6212 imposes upon the plaintiff the burden of proving a *prima facie* case warranting the attachment. The defendant's response can be in the nature of a demurrer, i.e., that no *prima facie* case has been made out, or a rebuttal. The latter approach shifts the burden of going forward to the defendant but only after the plaintiff has already carried his burden. The procedure is no different when the plaintiff makes out his *prima facie* case *ex parte* in the first instance. It is only by artificially fragmenting the *ex parte* procedure that one can successfully appear to argue that the burden on the motion to vacate is that of the defendant. The distinction, if any, is purely formal and semantic; it is not substantive.

---

[3] The cases cited in the lower court's opinion which are concerned solely with the "unnecessary security" ground may constitute an exception, i.e., a defendant moving only on this ground may have the burden of going forward in the first instance, a burden which New York requires the plaintiff to bear in all other cases. It would appear that a motion based on the "unnecessary security" ground might require defendant to carry the burden as (a) such a motion is not directed to an attack upon any ground for attachment initially proved by the plaintiff and (b) the facts which would tend to prove that the security is unnecessary, albeit a valid ground for attachment exists, are peculiarly within the knowledge of the defendant, e.g., the extent and availability of assets to satisfy a judgment which might be procured by the plaintiff. In any event: (a) the "unnecessary security" ground is totally irrelevant to the case at bar and (b) this ground is an additional remedy afforded to a New York defendant which is not to be found in the Louisiana statute.

Whether this Court adopts the lower court's formal conclusion that the burden of proof in New York is on defendant or concludes that the burden of proof is on the plaintiff, substantial due process questions are raised by this appeal whether the scope and procedure of the hearing are sufficient.

2. There is a Substantial Question Whether any Prejudgment Seizure of Property in which the Plaintiff does not have a Vendor's Lien or a Similar Statutory Lien can Meet the Test of Due Process Regardless how Protective the Scope and Nature of the Preliminary Hearing are to a Defendant.

In *Mitchell,* this Court enunciated the general proposition that *ex parte* prejudgment seizure orders satisfy due process if the substantive and procedural protections attending such orders reach a constitutional accommodation of the respective interests of the parties. However, the facts considered by the Court in *Mitchell* included the existence of a vendor's lien recognized under the statutes of Louisiana. Dealing with the specific facts before it, the Court in *Mitchell* stated, *inter alia:*

> "The reality is that both seller and buyer had current real interest in the property . . ." 416 U.S. 604.

The decision of the court below has, in effect, required a vendor's lien or at least a similar possessory lien as a *sine qua non* of the constitutionality of a prejudgment seizure. While this is one of the grounds upon which the court below relied for its declaration of the unconstitutionality of *ex parte* orders, its *rationale* would require as well the existence of such a possessory lien for prejudgment seizure orders made after notice and hearing. The *rationale* places under a cloud the constitutionality of all prejudgment seizure orders, *ex parte* or after notice, on

whatever ground, fraud, jurisdiction, etc., where the plaintiff does not hold a possessory lien.[4]

Hence, this appeal clearly presents to this Court a substantial question whether the existence of a possessory lien is a *sine qua non* of due process in prejudgment seizures.

3. There is a Substantial Question Whether any Prejudgment Seizure Grounded on Fraud can Meet the Test of Due Process, Regardless how Protective the Scope and Nature of the Preliminary Hearing are to a Defendant.

Similarly, dealing with the specific facts before it, the Court in *Mitchell* found that "the existence of the debt, the lien and the delinquency . . . are ordinarily uncomplicated matters that lend themselves to documentary proof". 416 U.S. 609.

One of the grounds upon which the lower court based its decision was that fraud issues "are notably unsuitable to determination on documentary proof alone" (11a). The *rationale* of the court below would indicate that orders of attachment grounded on fraud, *ex parte* or after notice and hearing, cannot satisfy due process, regardless the substantive and procedural protections provided. Whether this be the case is a substantial question raised on this appeal.

---

[4] While Curtis did not have a possessory lien, its distribution agreement with Champion gave it a specific contractual lien on the publications which were removed from Champion through the alleged sales by Wrestling to two purported vendees. The consideration for one of these purported sales was the only property upon which the sheriff levied. Also, creditors have well recognized interests in conveyances by their debtors without consideration where the debtor is insolvent or unable to make payment. See, e.g., New York Debtor and Creditor Law, § 273, *et seq.*

4. There is a Substantial Question Whether Prejudgment Seizures Grounded upon Dissipation, Secretion or Removal from the Reach of the Plaintiff of Assets Required to Satisfy a Judgment, Meet the Due Process Test.

The decision in *Fuentes,* even if broadly read as holding that prejudgment seizures issued *ex parte* violate due process, nevertheless sets forth some specific exceptions. 407 U.S. 67, 91, 93. One of those exceptions is the issuance of an *ex parte* order "to guard against the demonstrated possibility that the alleged debtor will destroy or conceal disputed goods". The court below found this exception to be inapplicable to the case at hand (fn. 5 to the lower court's decision). There is no indication of the lower court's *rationale* in reaching this determination. One can only conjecture that the lower court reads the words "disputed goods" most narrowly so that other forms of property are not to be considered within the exception enunciated in *Fuentes.* More specifically, the lower court did not view the proceeds of the purported sales of the publications in which Curtis had a contractual security interest as analogous to, or falling within, the "disputed goods" exception enunciated in *Fuentes.*

One of the three subparagraphs of CPLR 6201 upon which the order of attachment was grounded by the state court, subparagraph (4), is that:

> "The defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of those acts."

Hence, the lower court has in effect held that statutes permitting prejudgment seizure based upon a showing that the defendant with fraudulent intent is secreting or disposing of his assets cannot satisfy due process, as no pre-

liminary hearing can be adequate to resolve such issues. If the Court should find that fraud issues generally are not amenable to determination by preliminary hearing, and that attachments generally grounded on fraud are therefore violative of due process, a substantial question is raised on this appeal whether fraudulent disposal or secretion of assets, specifically form the basis for prejudgment seizures satisfying due process.

CONCLUSION

This appeal presents substantial questions regarding the nature and scope of the hearing, the permissible grounds and the extent of the interest in property required for due process in prejudgment seizures. Probable jurisdiction should therefore be noted.

Dated: New York, New York, January 6, 1975.

Respectfully submitted,

PHILIP H. BUSNER,
Attorney for Appellants
Curtis Circulation Company and
Continental Casualty Company

FRED I. SONNENFELD
YOUNG, SONNENFELD & BUSNER
Of Counsel